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JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 969

KECO INDUSTRIES, INC.,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

REPLY TO RESPONDENT'S MEMORANDUM IN OPPOSITION

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The Solicitor General has filed with the Court a document misnamed a "Memorandum for the United States in Opposition," which neither opposes the two questions petitioner has presented to the Court nor disagrees with the petitioner's reasons why the Court should grant a writ of certiorari. In fact, the Memorandum does not refer to any part of the petition.

Respondent simply says that "the decision below is correct, and further review is not warranted" (p. 4). The Memorandum gives two reasons. The first is that the Court of Claims properly ruled that the substitution by the Government of electric refrigerators for gasoline refrigerators was within the scope of the Changes clause of the contract because in "overall dimensions" and "most basic parts" the two types of refrigerators were the same. Respondent ignores the fact that the Court of Claims' position conflicts with this Court's holding in *Freund v. United States*, 260 U.S. 60 (1922), which limited changes to those "fairly and reasonably within the contemplation of the parties when the contract was entered into," in that no consideration was given to several relevant clauses in petitioner's contract.

The second reason respondent offers for the correctness of the decision below is essentially that under established precedents an equitable adjustment under the Changes clause should be simply a corrective measure for keeping a contractor in the same position he was in prior to the Government's modification of his contract. However, respondent fails to recognize that, in applying these precedents to unit-priced government contracts, the decision below establishes a measure of compensation under the Changes clause substantially different from the compensation provided for under the Termination for Convenience of the Government clause with the result that a contracting officer is empowered to affect arbitrarily a contractor's profit or loss in circumstances where either clause may be used to accomplish the same or a similar contractual modification. Such a result can harm not only the private contractor but also the public interest in economical Federal procurement.

The basic questions petitioner has presented to the Court have important implications for the fair adminis-

tration of public contracts. These implications go beyond respondent's over-simplified statement of the facts and the applicable law. The petition should be granted.

Respectfully submitted,

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